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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT WILLIAM ROY,
PETITIONER,
v.

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER IN HOLDING THAT AN APPELLATE COURT CAN FIND PROBABLE CAUSE DESPITE THE INABILITY OF THE OFFICERS CONDUCTING THE SEARCH TO ARTICULATE WHAT THEY WERE SEARCHING FOR AND WHY, THE ELEVENTH CIRCUIT ANNOUNCED A NEW PRINCIPLE OF LAW, ONE WHICH IS IN DIRECT CONFLICT WITH THE RECENT DECISION OF THIS COURT IN UNITED STATES V. SOKOLOW AS WELL AS THE DECISION OF FIRST CIRCUIT IN UNITED STATES V. LOTT AND WHICH THREATENS TO UNDERMINE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Robert William Roy, and the Respondent, United States of America.

TABLE OF CONTENTS

QUESTION PRESENTED 1

LIST OF PARTIES 2

OPINIONS BELOW 6

JURISDICTION 7

CONSTITUTIONAL PROVISION INVOLVED 8

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 20

IN HOLDING THAT AN APPELLATE COURT CAN FIND PROBABLE CAUSE DESPITE THE INABILITY OF THE OFFICERS CONDUCTING THE SEARCH TO ARTICULATE WHAT THEY WERE SEARCHING FOR AND WHY, THE ELEVENTH CIRCUIT ANNOUNCED A NEW PRINCIPLE OF LAW, ONE WHICH IS IN DIRECT CONFLICT WITH THE RECENT DECISION OF THIS COURT IN UNITED STATES V. SOKOLOW AS WELL AS THE DECISION OF FIRST CIRCUIT IN UNITED STATES V. LOTT AND WHICH THREATENS TO UNDERMINE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT 20

CONCLUSION 30

APPENDIX 1

TABLE OF AUTHORITIES

Cases:

Carroll v. United States,
354 U.S. 394 (1957) 7

Chambers v. Maroney,
399 U.S. 42 (1970) 25

Johnson v. United States,
333 U.S. 10 (1948) 28

Marron v. United States,
275 U.S. 192 (1927) 27

Maryland v. Macon,
472 U.S. 463 (1985) 22

Texas v. Brown,
460 U.S. 730 (1983) 27

United States v. Andrew Sokolow,
___U.S.___, 109 S.Ct. 1581 (1989) . . 21

United States v. Clark,
559 F.2d 420 (5th Cir.),
cert. denied, 434 U.S. 969 (1977) . . 23

United States v. Gray,
659 F.2d 1296 (5th Cir. Unit B 1981) 23

United States v. Grubczak,
793 F.2d 458 (2d Cir. 1986) 28

United States v. Lott,
870 F.2d 778 (1st Cir., 1989) . . . 21

United States v. Martinez,
808 F.2d 1050 (5th Cir.),
cert. denied, 107 S.Ct. 1962 (1987) . 27

United States v. Reyes,
792 F.2d 536, 538 (5th Cir. 1986) . . 25

United States v. Roy,
680 F.Supp. 370 (S.D. Fla. 1988) . . 10

United States v. Roy,
869 F.2d 1427 (11th Cir. 1989) . . . 10

United States v. Smith,
799 F.2d 704 (11th Cir. 1986) 22

United States v. Williams,
617 F.2d 1063 (5th Cir. 1980)(en banc) 26

Statutes, Rules, and Constitutional Provisions:

28 U.S.C. Sec. 1254(1) 7

The Fourth Amendment,
Constitution of the United States . . . 8

Miscellaneous:

3 LaFave Search & Seizure 2nd Ed. Sec.
7.2(c) 25

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT WILLIAM ROY,
PETITIONER,
v.

UNITED STATES OF AMERICA
RESPONDENT.

The Petitioner Robert William Roy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in United States v. Roy, 869 F.2d 1427 (11th Cir. 1989), rehearing and rehearing en banc denied May 16, 1989.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as United States v. Roy, 869 F.2d 1427 (11th Cir. 1989) and is reprinted in the appendix hereto (App., infra, 1-35).

The initial opinion of the United States District Court for the Southern District of Florida is reported as United States v. Roy, 680 F.Supp. 370 (S.D. Fla. 1988) and is reprinted in the appendix hereto (App., infra, 36-59).

The decision of the Eleventh Circuit denying rehearing and rehearing en banc is reproduced in the appendix hereto (App., infra, 60).

JURISDICTION

On April 10, 1989, the Eleventh Circuit Court of Appeals affirmed the decision of the district court. A petition for rehearing with a suggestion for rehearing en banc was timely filed. Rehearing was denied on May 16, 1989.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. Sec. 1254(1). Carroll v. United States, 354 U.S. 394 (1957).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in Court Below.

On August 26, 1987, Robert William Roy was indicted for conspiracy to possess with the intent to distribute at least 100 kilograms of marijuana, while on board a United States vessel, in violation of 46 U.S.C. Section 1903(j) (Count I), and possession with the intent to distribute at least 100 kilograms of marijuana, while on board a United States vessel, in violation of 46 U.S.C. Section 1903(a) and 18 U.S.C. Section 2 (Count II).

On October 22, 1987, Roy moved to suppress all evidence discovered as a consequence of an unconstitutional search of his vessel. On February 5, 1988, following an evidentiary hearing, the Honorable Lenore C. Nesbitt granted the defen-

dant's motion. United States v. Roy, 680 F.Supp. 370 (S.D. Fla. 1988). On April 10, 1989, the Eleventh Circuit Court of Appeals reversed Judge Nesbitt. The Eleventh Circuit upheld that portion of the Judge's order finding that the Coast Guard could not lawfully re-board a vessel to continue with a safety and documents inspection where that vessel had passed such an inspection only two hours before. The court, however, reversed the Judge's finding that the officers lacked probable cause to re-board and search for contraband. United States v. Roy, 869 F.2d 1427 (11th Cir. 1989).

2. Statement of Facts.

On August 14, 1987, at approximately 2:30 p.m. a United States Coast Guard Law Enforcement Detachment Team ("LEDT")

aboard the U.S.S. Sellers, a naval warship, detected a U.S. vessel, the "Tri-Dive," a forty-six foot trimaran (three-hull sailboat) travelling approximately forty-five miles off the coast of Jamaica. After identifying the vessel, the LEDT Coast Guard Team determined that the Tri-Dive and its master were on their lookout or EPIC report list, indicating that Drug Enforcement Administration believed that the vessel was being used to traffick in contraband. EPIC identified the owner and master as Robert "Ray."

A five man boarding team was deployed to board the Tri-Dive. Upon boarding, the officer in charge of the boarding team, Chief Petty Officer Eddie Villafane, identified himself to Roy who in turn identified himself as the master and owner of the vessel. Roy was advised that the boar-

ding team was there to check for compliance with United States laws and that all man-size compartments would be examined for security purposes.

During the suppression hearing, Chief Villafane insisted that it was not their intent to search for drugs. Their sole purpose was to conduct a safety and documents inspection.

The search of the Tri-Dive was conducted by Officers Long and Rathert and lasted over two hours. An hour and fifteen minutes into the search, Officer Rathert reported to Chief Villafane that he had discovered fresh caulking in the port-side sleeping area along the seam of one of the deck panels. Villafane referred to this area as the master bedroom because there was a mirror there.

Based upon their observation of the configuration and structure of the sleeping area, the officers determined there was a large space in the pontoons below the sleeping quarters. Roy was asked what was in the pontoons below the deck and responded that he had not been inside but that the previous owner had told him that they contained floatation foam. Upon being assured that the Coast Guard would repair any damage, Roy agreed to permit team members to drill into the deck. Officers Rathert and Long drilled two holes in the deck; one hole to look through and the other to shine a light through for illumination. Because the officers were not able to see anything, Roy volunteered to expand the opening which he did. The drilling revealed a white foamy substance.

Officer Rathert also testified that during his initial inspection of the vessel he noticed a caulking gun and phillips-head screwdriver in the pilot house, each of which contained fresh caulking. Rathert approached Roy and asked whether he had recently done any caulking, to which Roy responded he had only done some caulking around windows which were leaking. Rathert then inspected the windows of the vessel and found no fresh caulking. Rathert also noted that the screwdriver he had seen earlier did not match the window screens. Continuing his sweep in the starboard berthing area, Rathert discovered fresh caulking on a deck panel above the starboard pontoon in the same place as the caulking discovered in the port-side area. Rathert also observed screws partially hidden by the caulking which appeared to

match the phillips-head screwdriver found earlier. Rathert inquired of Roy about the caulking in the starboard area to which Roy replied that the previous owner may have done some work there. Rathert said that at the time of the first boarding he did not communicate this information to any of his fellow officers.

After a two and one-half hour search of the vessel, Chief Villafane decided to terminate the boarding and return to the Naval vessel. Before leaving the Tri-Dive, Roy was given a completed Form 4100 boarding report which reflected the he was in all respects in compliance with applicable United States regulations and that no contraband was found to be on board. According to Villafane, this meant that they had checked out all the navigational and safety equipment and had inspected the

bilges to insure that the vessel was not leaking oil or otherwise polluting the ocean.

After returning to their vessel, members of the boarding team met with their commander, Lt. J. G. Snyder, to conduct a debriefing. At this time, Rathert reported to his team his finding of the caulking gun and the phillips-head screwdriver and his examination of the windows on the starboard side. The team also discussed the inconsistency between Roy's statement that they had been at sea for one day and his passenger's statement that they had been at sea for two or three days. The boarding team then decided to return to the vessel and commence another boarding.

Villafane stated that the only thing that they felt uncomfortable about was the

fact that there was a man-size compartment that they could not get access to. The fact that there was wet caulking meant that someone had been in there at some point in time. Villafane admitted that they had already determined that the vessel was in compliance with United State law, that it was seaworthy, and that its documents were in order. Villafane further acknowledged that they did not suspect that anyone else was on board.

Rathert stated that the purpose of the second boarding was to access the compartment for space accountability. According to Rathert, since it was a man-size compartment there could have been someone in there. Rathert then admitted that they really did not believe that there was anyone in the pontoons. Rathert then said they needed to gain access to

see if there were any cracks or leaks. Rathert admitted that they had previously determined that the Tri-Dive was seaworthy and had given it a clean bill of health in the Form 4100 given to the master. Finally, Rathert admitted "We had no idea what was in there."

Roy was asleep at the time the officers boarded the vessel for the second time. When Roy "came up top," Officer Villafane advised him that they were going to conduct another search to obtain access to the pontoons. Roy expressed concern over further damage to his vessel and was assured that the Coast Guard would pay for the damage. Rathert entered the starboard pontoon, removed the wood panels from the deck, climbed into the empty compartment below, and discovered bales of marijuana

behind a second ply-wood panel in the rear of the compartment.

REASONS FOR GRANTING THE WRIT

IN HOLDING THAT AN APPELLATE COURT CAN FIND PROBABLE CAUSE DESPITE THE INABILITY OF THE OFFICERS CONDUCTING THE SEARCH TO ARTICULATE WHAT THEY WERE SEARCHING FOR AND WHY, THE ELEVENTH CIRCUIT ANNOUNCED A NEW PRINCIPLE OF LAW, ONE WHICH IS IN DIRECT CONFLICT WITH THE RECENT DECISION OF THIS COURT IN UNITED STATES V. SOKOLOW AS WELL AS THE DECISION OF FIRST CIRCUIT IN UNITED STATES V. LOTT AND WHICH THREATENS TO UNDERMINE THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

Neither the officer who discovered contraband aboard petitioner's vessel nor his superior articulated either an intent to search for contraband or a belief that contraband was present. Indeed Seaman Rathert stated, "We had no idea what was in there." And Chief Villafane insisted that they were not searching for contraband, but rather conducting a routing

safety and documents inspection. Nevertheless, having found that the officers lacked the authority to conduct a safety inspection, the Eleventh Circuit held that the officers had probable cause to search for contraband based on the court's post factum analysis of the circumstances present.

1. The decision of the Eleventh Circuit is in direct conflict with the recent decision of this Court in United States v. Andrew Sokolow, ___U.S.___, 109 S.Ct. 1581 (1989) as well as the decision of the First Circuit in United States v. Lott, 870 F.2d 778 (1st Cir., 1989).

In Roy, the Eleventh Circuit held that an appellate court may find probable cause to conduct a search for contraband in the face of an officer's insistence that he was not searching for contraband.

In Sokolow, this Court denied such a possibility:

> A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent (emphasis added).

Id. at 1587.

In holding that an appellate court can find probable cause under these circumstances, the Eleventh Circuit relied upon a line of authority which stands for the proposition that an officer's subjective belief that he does not have probable cause is not determinative of whether the officer acted lawfully in conducting a search. Maryland v. Macon, 472 U.S. 463, 470-71 (1985); United States v. Smith, 799 F.2d 704, 708-09 (11th Cir. 1986); United

States v. Gray, 659 F.2d 1296, 1300 (5th Cir. Unit B 1981); United States v. Clark, 559 F.2d 420, 425 (5th Cir.) cert. denied, 434 U.S. 969 (1977).

An examination of these cases, however, demonstrates that the courts were concerned with an officer's legal conclusion that he lacked probable cause. But in each of those instances, the officers testified that they were indeed searching for contraband and why they thought contraband was present.

The instant case stands in marked contrast. Here the officers explicitly stated that they were not searching for contraband.

In Lott the First Circuit stated:

> Although Terry and Long speak in terms of an objective test ("reasonableness") for determining the validity of an officer's frisk for weapons, we do not read those cases as permitting

> a frisk where, although the circumstances might pass an objective test, the officers in the field were not actually concerned for their safety. Indeed, this point seems to be implicit in the Supreme Court's reasoning. See, e.g., Long 463 U.S. at 1049, 103 S.Ct. at 3480 (a search for weapons is allowed "if the police officer possesses a reasonable belief")(emphasis added); id. at 1051, 103 S.Ct. at 3482 (police may search if "they possess" a reasonable belief)(emphasis added); id. at 1052 n. 16, 103 S.Ct. at 3482 n. 16 (in order to search, "the officer must have an articulable suspicion")(emphasis added) Ybarra, 444 U.S. at 93, 100 S.Ct. at 343 (a frisk is permitted by the officer when "he reasonably believes or suspects" the detainee to be armed (emphasis added). An officer cannot have a reasonable suspicion that a person is armed and dangerous when he in fact has no such suspicion.

870 F.2d at 784.

2. The decision of the Eleventh Circuit threatens to undermine the protections afforded by the Fourth Amendment and

is thus of great importance to rights of our citizens to be free from unreasonable searches and seizures.

Significant jurisprudential concerns dictate that officers involved in a search must be required to articulate what they are searching for and why they believe what they are searching for is present.

While the police may proceed to search a vessel without first obtaining a warrant, only the procedure of acquiring a search warrant is excused; there still must be grounds upon which a search warrant could have been issued. United States v. Reyes, 792 F.2d 536, 538 (5th Cir. 1986); 3 LaFave Search & Seizure 2nd Ed. Sec. 7.2(c), p. 41. As this Court recognized in Chambers v. Maroney, 399 U.S. 42 (1970), it is still essential that there be "circumstances which furnish probable

cause to search a particular auto for particular articles."

Although the requirement for a search warrant is dispensed with on the high seas, it is dispensed with only because there exists exigent circumstances. United States v. Williams, 617 F.2d 1063, 1087 (5th Cir. 1980)(en banc). The standard for probable cause is the same. In order to obtain a warrant the Fourth Amendment commands officers to demonstrate probable cause "particularly describing the place to be searched and the persons or things to be seized."

The importance of this case to Fourth Amendment jurisprudence is manifest. Surely no court would contend that a search warrant could issue where officers could not articulate what they were looking for or why. Yet the court in this case upheld

a warrantless search in just such a circumstance. A warrantless search offers far less protection to the average citizen then a search pursuant to a warrant. To eliminate the particularity requirement for such searches is to undermine the very foundation of the Fourth Amendment and to encourage the kinds of general searches that the Fourth Amendment was intended to prevent. Marron v. United States, 275 U.S. 192 (1927); Lafave, Section 4.6(a), p. 234.

3. The decision of the Eleventh Circuit undermines the deference that the courts have traditionally accorded to the expertise of law enforcement officers, Texas v. Brown, 460 U.S. 730, 742-43 (1983); United States v. Martinez, 808 F.2d 1050, 1056 (5th Cir.) cert. denied, 107 S.Ct. 1962 (1987); United States v. Grub-

czak, 793 F.2d 458, 461 (2d Cir. 1986), as well as to the principle that a search cannot be justified by what is found. Johnson v. United States, 333 U.S. 10 (1948). A reviewing court will always find suspicious, facts viewed through glasses colored by the discovery of contraband. But before that discovery is made, officers must rely upon their experience and that experience may lead them to draw different conclusions.

For instance, the court placed great weight on the fact that the Tri-Dive and its master were on an EPIC list. But Chief Petty Officer Villafane testified that many times vessels on this list are found not to be carrying contraband. The court also ignored facts which may well have been taken into consideration by the boarding officers, such as the fact that no

contraband was seen when they drilled into the pontoons, the fact that petitioner and his passenger were fully cooperative and had even assisted the officers in drilling into the boat, and the fact that the vessel did not have a false water line, was not riding low in the water, and had not tried to evade the Coast Guard.

The Eleventh Circuit, however, chose to disregard the testimony of the officers and substitute its view of the circumstances. Such a procedure implicitly conflicts with the holding of this court in Johnson and again directly conflicts with the decision of the First Circuit in Lott:

> Second, where a search has been made without any legal basis, we do not think that an ex post facto reconstruction based upon an argument of objective reasonableness can validate the search.

870 F.2d at 784.

CONCLUSION

If officers are not required to articulate a basis for their belief that contraband is located in a particular place they will be far less reticent about conducting general exploratory searches. They will know that courts will strain to find significance in facts that they themselves did not find telling. It was to prevent just this situation that this Court in Sokolow held that the courts cannot rely exclusively on a profile, that they must still require that the officer explain why he thought contraband would be found. Because the decision of the Eleventh Circuit represents a dangerous departure from Sokolow, this case merits review by this court.

Respectfully submitted.

JON MAY
Counsel of Record

June 1989

APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

Robert William ROY
Defendant-Appellee.

No. 88-5230

United States Court of Appeals,
Eleventh Circuit

April 10, 1989

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and MARKEY, Chief Circuit Judge.

HATCHETT, Circuit Judge.

Holding that the existence of probable cause is based on the totality of the circumstances using an objective rather than a subjective standard, we reverse

the district court's order granting a motion to suppress evidence.

FACTS

On August 14, 1987, at approximately 2:30 p.m. a United States Coast Guard Law Enforcement Detachment Team (LEDT), detected a United States vessel, the TRI-DIVE, while on patrol in international waters traveling approximately forty-five miles off the coast of Jamaica. The TRI-DIVE is a forty-six foot trimaran (three-hull sailboat, symmetrical in design). After identifying the vessel, the LEDT discovered that the TRI-DIVE and its master were on the El Paso Intelligence Center (EPIC) report list.[1] The LEDT deployed a boarding team. When the team boarded the vessel, Robert William Roy identified himself as master and owner of the vessel. The officer in command, a captain, advised Roy

that the boarding team would check the TRI-DIVE's compliance with United States laws and regulations, and examine all man-size compartments pursuant to a security sweep. Roy did not object to the inspection.[2]

After two and one-half hours, the LEDT boarding team terminated the security search. Before leaving the TRI-DIVE, the LEDT team gave Roy a completed boarding report stating that the TRI-DIVE complied with applicable United States regulations in all respects, including the absence of illegal contraband. After returning to their vessel, the boarding team members met with their commander for a debriefing. During debriefing, the offices realized that they had overlooked a man-size compartment in the starboard pontoon of the

TRI-DIVE. They decided to return to the TRI-DIVE and conduct another inspection.

Approximately two and one-half hours after the first boarding, the Coast Guard officers reboarded the TRI-DIVE to obtain access to the man-size compartment in the starboard pontoon. At the second boarding, Officer Villafane advised Roy that the team would conduct a search to inspect the compartment they had overlooked. Seaman Rathert entered the starboard pontoon, removed the wood panels from the deck, climbed into the compartment, and discovered bales of marijuana. The officers arrested Roy and advised him of his rights.

PROCEDURAL HISTORY

On August 26, 1987, a grand jury indicted Roy for conspiracy to possess with intent to distribute at least 100

kilograms of marijuana while on board a United States vessel, in violation of 46 U.S.C.App. section 1903(j)(Count I), and possession with intent to distribute at least 100 kilograms of marijuana while on board a United States vessel, in violation of 46 U.S.C.App. section 1903(a) and 18 U.S.C. section 2 (Count II). Roy filed a motion to suppress all evidence, contending that the Coast Guard lacked probable cause to conduct the search.

On February 5, 1988, following a two-day suppression hearing, the district court granted Roy's motion to suppress.[3] The district court found that: Roy had standing to contest the search; the first boarding and inspection were proper under 14 U.S.C. section 89(a); the second boarding and search exceeded fourth amendment

reasonableness requirements; and Roy did not consent to the second search.

CONTENTIONS

The government contends that the district court erred in granting Roy's motion to suppress. The government argues that the second boarding and search were a continuation of the first document and safety search, pursuant to 14 U.S.C. section 89(a); consequently, it did not require probable cause or suspicion of criminal activity. The government avers that section 89(a) allows the Coast Guard to search United States vessels and does not place any limits on the frequency of such searches.

Alternatively, the government argues that the Coast Guard had probable cause to conduct the second search. The government asserts that prior to reboarding the ves-

sel, the Coast Guard knew: that the TRI-DIVE was a suspected smuggling vessel in a suspected smuggling area; that Roy made suspicious statements; that caulking tubes and both a caulking gun and Phillips-head screwdriver with fresh caulking were found aboard the vessel; that fresh caulking was evident on the panels over the large unaccounted for pontoon spaces; that the Phillips-head screws were filled with fresh caulking on the deck panels; and that the caulking on the deck panels over the pontoon areas had the same consistency as the caulking on the caulking gun and screwdriver.

Roy contends that the district court correctly granted his motion to suppress the evidence. Roy argues that the second boarding and search of the TRI-DIVE were not conducted pursuant to section 89(a),

and the Coast Guard needed probable cause to support the search. Because the Coast Guard did not have probable cuase to support the search and the seizure, the search was unreasonable and violative of the fourth amendment to the United States Constitution.

ISSUE

We decide whether the district court erred in granting Roy's motion to suppress the marijuana.[4]

DISCUSSION

I. Standard of Review

This appeal requires us to independently apply legal principles to the district court's findings of fact, unless those findings are clearly erroneous. Adams v. Balkcom, 688 F.2d 734, 739 (11th Cir. 1982). The district court found that the section 89(a) document and safety

inspection was concluded after the first boarding. The district court concluded that no reasonable suspicion existed to provide a constitutional justification for the second boarding, search, and seizure of the TRI-DIVE. The district court held, as a matter of law, that the second search exceeded fourth amendment reasonableness requirements.

Absent clear error, we are bound by the district court's findings of fact and credibility choices at the suppression hearing. United States v. Newbern, 731 F.2d 744, 747 (11th Cir. 1984); United States v. Aldridge, 719 F.2d 368, 373 (11th Cir. 1983). We construe all facts in the light most favorable to the prevailing party when reviewing the district court's grant of a motion to suppress. United States v. Edmondson, 791 F.2d 1512,

1514-15, (11th Cir. 1986). A finding of fact is clearly erroneous only when we are left with a definite and firm conviction that a mistake has been committed. United States v. Edmondson, at 1515. We review independently the district court's conclusion that the second search exceeded fourth amendment reasonableness requirements.

II. Searches on the High Seas

Title 14 U.S.C. section 89(a) authorizes Coast Guard officers to board vessels and make safety and document inspections without suspicion of criminal activity. United States v. Lopez, 761 F.2d 632, 636 (11th Cir. 1985). Our case law has delineated two types of searches that occur on the high seas: the limited search and the full "stem to stern" search.

A limited search is permissible on a reasonable suspicion of criminal activity. United States v. Lopez, at 636. Although we examine the totality of the circumstances to determine reasonable suspicion, reasonable suspicion must be more than a mere generalized suspicion or hunch. United States v. Pearson, 791 F.2d 867, 870 (11th Cir.), cert. denied, 479 U.S. 991, 107 S.Ct. 590, 93 L.Ed.2d 591 (1986); United States v. Reeh, 780 F.2d 1541, 1544 (11th Cir. 1986). Reasonable suspicion must be based on specific articulable facts, together with rational inferences drawn from those facts, which reasonably warrant suspicion of criminal activity. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 2581, 45 L.Ed.2d 607 (1975). Law enforcement officers may subjectively assess those facts in light

of their expertise. United States v. Pearson, at 870.

A full stem to stern search is permissible on probable cause that a crime has been, or is being, committed. To determine the existence of probable cause, we examine whether the facts and circumstances known to law enforcement officials could have warranted their reasonable belief that a crime had been or was being committed. Alternatively, we examine whether the facts in their totality, together with the synthesis of what the agents collectively heard, knew and observed, considered in light of the agent's individual experience, presented the probability that a crime had been or was being committed. United States v. Lopez, at 636.

With these principles in mind, we must determine whether the district court's findings, that the section 89(a) document and safety inspection concluded after the first boarding and that no reasonable suspicion or probable cause existed to provide a constitutional justification for the second boarding, search and seizure of the TRI-DIVE are correct.

III. The Continuation Argument

The district court found that the boarding team's initial safety and document inspection was proper. United States v. Roy, 680 F.Supp. 370, 372-3 (S.D. Fla. 1988). The government contends that the second search was merely a continuation of the original section 89(a) search which failed to account for all the space on the vessel.

The government argues that section 89(a) does not limit the frequency of document and safety searches. It cites United States v. Willis, 639 F.2d 1335, 1337 (5th Cir. Unit A 1981) to support its argument that reboarding could have been undertaken as a continuation of the section 89(a) search. Even if the boarding party harbored a subjective motive to search for narcotics violations in addition to their intent to account for the pontoon compartments, the government argues that such dual motives do not undermine the validity of a section 89(a) search. See United States v. Brantley, 733 F.2d 1429, 1442 (11th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985); United States v. Luis-Gonzalez, 719 F.2d 1539, 1549 (11th Cir. 1983). The government further

argues that the pontoon compartments were non-private areas and subject to a section 89(a) inspection without any suspicion of wrongdoing. United States v. Thompson, 710 F.2d 1500, 1505 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 730, 79 L.Ed.2d 190 (1984).

In United States v. Willis, we held that a section 89(a) search did not implicate fourth amendment interests where the Coast Guard had full authority to enter a ship's fish-hold. We held that no expectation of privacy existed where the Coast Guard had authority to go, regardless of the subjective expectations or intent of the boarding party. We rejected the argument that the Coast Guard could not perform the search because it had performed a document and safety inspection four months earlier. Section 89(a) places no

limits on the frequency of document and safety inspections. United States v. Willis, at 1337.

Roy asserts that the Coast Guard's authority, even with section 89(a), is circumscribed by the constitutional requirements of the fourth amendment. United States v. Postal, 589 F.2d 862, 890-91 (5th Cir.), cert. denied, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979). Roy argues that a significant difference exists between a document and safety inspection which occurs four months after a prior inspection and one which occurs two and one-half hours later.

We agree. During a four-month period, it is reasonable to expect that the vessel's seaworthiness and safety compliance may have changed. This rationale is absent when a subsequent inspection occurs

within two and one-half hours. The Coast Guard had no reason to question the safety or documentation of the TRI-DIVE after two and one-half hours, because it had just certified that it complied with all applicable United States laws. It is unreasonable to believe that the TRI-DIVE's seaworthiness and safety compliance may have changed for the worse after the Coast Guard determined that it was safe less than three hours before. No logical nor common-sense reason exists to continue a completed document and safety inspection. Accordingly, the district court finding that the section 89(a) document and safety inspection was concluded after the first boarding is not clearly erroneous.[5]

IV. Probable Cause and/or Reasonable Suspicion

Alternatively, the government contends that the Coast Guard had probable cause to conduct the second search. The government argues that the second search was valid under the fourth amendment because the boarding team had probable cause to believe that contraband was concealed in the pontoon compartments when they reboarded the TRI-DIVE to conduct the second search. The government argues that when the Coast Guard engaged in the second search, the officers had collectively compiled the following information: an EPIC report listing the TRI-DIVE as a vessel known to have been trafficking in contraband, suspected of smuggling marijuana from Jamaica to Florida and identifying the owner as Robert "Ray"; the

TRI-DIVE was travelling in an area where a "mother ship" smuggling operation had supposedly occurred the day before; Roy and his companion gave inconsistent statements about how long they had been on the vessel; Seaman Rathert discovered caulking tubes and both a caulking gun and Phillips-head screwdriver with fresh caulking; large unaccounted-for pontoon spaces existed in the outer pontoons; Roy stated that those spaces were inaccessible; Seaman Rathert discovered fresh caulking on the panels over the unaccounted-for pontoon spaces; Roy initially denied doing any caulking, but subsequently stated that he caulked around the windows and suggested that the previous owner may have done some caulking and filled the pontoon with foam for floatation; the officers discovered an absence of caulking on the

windows; the officers discovered that the window screws did not match the Phillips-head screwdriver with the fresh caulking; that Roy had purchased the TRI-DIVE in November 1986, which discredited his statement that the previous owner did the fresh caulking; the officers discovered Phillips-head screws with caulking on the freshly caulked deck panel; and officers observed that the caulking on the panels over the port and starboard pontoon areas had the same consistency as the caulking on the caulking gun and screwdriver. According to the government, the collective information, compiled during the debriefing, provided the boarding party with sufficient probable cause to conduct the second search. (The relevant testimony is in an appendix attached to this opinion.)

In granting the motion to suppress, the district court indicated that the government's proof was unpersuasive because no witness clearly articulated a belief that the vessel was involved in drug smuggling. The government argues that the subjective conclusions of law enforcement officers do not determine whether probable cause exists and that the existence of probable cause is determined by an objective standard.[6] See Maryland v. Macon, 472 U.S. 463, 470-71, 105 S.Ct. 2778, 2782-83, 86 L.Ed.2d 370 (1985); United States v. Smith, 799 F.2d 704, 708-09, (11th Cir. 1986); United States v. Gray, 659 F.2d 1296, 1300 (5th Cir. Unit B 1981); United States v. Clark, 559 F.2d 420, 425 (5th Cir.), cert. denied, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977). The government emphasizes that

the lack of direct testimony to establish that the boarding party had probable cause to believe that the TRI-DIVE was engaged in narcotics violations does not prevent the panel from finding that probable cause existed.

Roy asserts that no Coast Guard officer articulated a reason to believe that contraband was aboard the TRI-DIVE. He argues that while the Coast Guard officers are afforded considerable opportunity to detect illegal activity pursuant to their document and safety authority, their authority does not confer an absolute or unrestricted right of access to private areas of a vessel. Roy cites United State v. Crews, 605 F.Supp. 730, 737 (S.D. Fla.), aff'd sub nom. United States v. McGill, 800 F.2d 265 (11th Cir. 1985), to argue that

> in order to perform a full search, as were performed in this case when the officers pulled up carpet and molding to assess interior portions of the vessel, the officers' suspicions must first have risen to the level of probable cause.

Crews, at 738, Roy asserts that absent the exceptions listed in United States v. Thompson, at 1507 and United States v. Kent, 691 F.2d 1376, 1382 (11th Cir. 1982), cert. denied, 462 U.S 1119, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983), the government is limited in the scope of its investigation.[7]

In United States v. Clark, a police officer stopped and searched a truck. Prior to the search, the officer smelled the odor of marijuana and sighted a clear plastic bag in plain view containing a marijuana like substance on the floor of the truck. The appellants contested the

search, contending that the officer lacked probable cause. Our predecessor court reaffirmed its holding in United States v. Resnick, 455 F.2d 1127 (5th Cir.), cert. denied sub nom. Carlton v. United States, 409 U.S. 875, 93 S.Ct. 121, 34 L.Ed.2d 127 (1972), cert. denied, 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d 246 (1973), and held that even though a police officer doubted the existence of probable cause, the court still had the duty to objectively determine whether probable cause was present. In finding that probable cause was present, we held in United States v. Resnick and United States v. Clark that the scope of the fourth amendment is determined objectively, and not by the subjective conclusions of the law enforcement officer.

In United States v. Gray, a Coast Guard commander testified that certain circumstances, i.e., the butt of a marijuana cigarette, the presence of multiple pairs of different size shoes, when only one person was alleged to be on board the vessel, and the lack of proper home port identification, created probable cause for him to believe that contraband was on board the vessel. We found that the facts supported probable cause, despite the commander's testimony at the suppression hearing that he did not personally believe probable cause existed until after the search began.

Although none of the government's witnesses in this case testified that they believed probable cause existed to search the TRI-DIVE for contraband, as shown above, the existence of probable cause is

determined by objective standards. It is not determined solely on the basis of what Coast Guard officers think. Courts determine the existence of probable cause. Based on the totality of the circumstances, we hold that the district court's ruling that no probable cause existed to support the second search is error.

CONCLUSION

The district court erred in granting Roy's motion to suppress.

REVERSED

Endnotes

1. The EPIC list indicated that the United States Drug Enforcement Agency believed the TRI-DIVE smuggled narcotics into the United States. The EPIC list also identified the owner and master of the vessel as Robert "Ray."

2. The boarding team conducted the inspection pursuant to 14 U.S.C. Section 89(a), which provides in pertinent part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested....

3. See United States v. Roy, 680 F.Supp. 370 (S.D. Fla. 1988).

4. Appellant Roy also raises the issue: whether this court should exercise its supervisory powers to uphold the district court's order of suppression as a consequence of the government's reliance on demonstrably false testimony. We do not address this issue.

5. We do not decide how often the Coast Guard may conduct section 89(a) document and safety inspections of the same vessel.

6. Although the district court discussed the reasonable suspicion standard, the government concedes that its search, if not authorized by section 89(a), must be supported by probable cause.

7. In United States v. Thompson, we determined that when the master of a vessel refuses to produce the vessel's documents, the Coast Guard may enter the vessel's cabin to search for those documents.

Similarly, when the required safety equipment such as fire extinguishers, life preserves, or visual distress signals are not apparent on deck, the Coast Guard is permitted to go below to determine whether the required equipment is present and in good repair. Finally, when a reason to question whether a vessel is taking on water exists, the Coast Guard may enter areas where they believe a leak might be present. In United States v. Kent, we determined that law enforcement officers have a right to conduct a limited topsided inspection of a vessel to ascertain whether all persons on board are accounted for.

APPENDIX

Officer Villafane testified in reference to the purpose of the searches:

Q. [Defense Counsel] You weren't boarding this vessel to inspect it for drugs or contraband?

A. [Villafane] No, sir.

Q. In fact, did you have any indication that the boat was engaged -- that there [was] contraband on board the boat prior to your boarding it?

A. We had information it was a category 3.

....

Q. What's a code 3, category 3?

A. It's vessels that have been known or they have information that it's involved in contraband trafficking, illegal federal violation, sir.

....

Q. So then you were boarding to see if there was drugs on board?

A. Negative, sir. That was not our intention, sir.

....

Q. I asked you if to determine whether the owner was in compliance with applicable laws and regulations if that included the drug laws and you said yes. Then I asked you why previously you had said you did not, one of the reasons of your boarding was not to search for drugs.

A. That is correct, sir. We go into man-sized compartments, sir. Okay? We go into searching for, like I said, for additional personnel on board vessels, sir. We go also for documentation check as well as for

the vessel's safety as well as for his equipment up to date, sir.

....

Q. So it is your testimony that you were not searching for drugs when you boarded the vessel.

A. That is correct, sir.

Q. That's what you want to stand on.

A. That's what I want to stand on.

Seaman Rathert testified:

Q. [Government Counsel] What happened as a result of this debriefing?

A. [Rathert] We decided that we would like to access that compartment just for space accountability.

Q. And then what happened?

A. We decided to go back over.

Q. And what did you do then?

A. We went back over to the vessel and informed the captain that we were

going to -- the boarding officer informed the captain that we were going to conduct another boarding, we would like to access that compartment for space accountability and safety.

....

Q. [Defense Counsel] Okay. And when you went back, what was the purpose of the second boarding.

A. To access the compartment.

Q. For what?

A. Space accountability.

Q. For what purpose?

A. There could have been somebody down there possibly. It's a man sized compartment.

THE COURT: There could have been what, officer?

THE WITNESS: There could have been -- it was a place where a person could have been hiding.

....

Q. [Defense Counsel] But you all participated in the decision to reboard, correct?

A. Yes.

Q. And the decision you participated in was to reboard to gain access to the area in the outer pontoon that you had not been able to get into before?

A. Yes.

Q. And that's the purpose you had when you reboarded?

A. Yes.

....

Q. [Defense Counsel] Now, you stated on direct that you decided to

access that area in the second boarding for purposes of space accountability?

A. Yes.

Q. And when you say for purposes of accountability, are you saying that you were not able to gain access to it the first time so you didn't know what was in there?

A. No. We had no idea what was in there.

UNITED STATES of America, Plaintiff,

v.

Robert W. ROY, Defendant.

No. 87-0583-CR.

United States District Court,
S.D. Florida

Feb. 5, 1988

ORDER GRANTING MOTION
TO SUPPRESS

NESBITT, District Judge.

This matter came on be heard pursuant to a Motion filed by the Defendant Robert Roy to suppress all evidence discovered as a consequence of an unconstitutional search of a vessel on the high seas. After conducting an evidentiary hearing and having examined the exhibits admitted into evidence and otherwise being duly advised in the premises the Court enters the following findings and order.

SUMMARY OF FACTS

On August 14, 1987 at approximately 2:30 p.m. the United States Coast Guard Law Enforcement Detachment Team ("LEDT"), on patrol in international waters, detected a U.S. vessel, the Tri-Dive, a forty-six foot trimaran (three-hull sailboat, symmetrical in design) travelling approximately forty-five miles off the coast of Jamaica. After identifying the vessel the LEDT Coast Guard team determined that the Tri-Dive and its master were on the lookout or EPIC report list, indicating that the vessel was believed by the United States Drug Enforcement Agency as one being used to smuggle narcotics into the United States. The EPIC list also identified the owner and master of the vessel as one Robert "Ray."

Upon approaching the Tri-Dive, a LEDT boarding team was deployed to board the vessel. Upon boarding, the captain of the LEDT team identified himself to Roy who in turn identified himself as master and owner of the vessel. Roy was advised that the LEDT team was there to check compliance with United States laws and regulations and pursuant to a security sweep all man-size compartments would be examined. Roy expressed no objection to the inspection.

During the search one of the Coast Guard officers discovered fresh caulking in the portside sleeping area along the seam of one of the deck panels. Based upon observation of the configuration and structure of the sleeping area the officers determined there was a large unaccounted-for space in the pontoon below the

sleeping quarters. Roy was asked what was in the pontoons below the deck and responded he had not been inside but the previous owner had told him that they contained floatation foam. Upon being assured that the coast Guard would repair any damage, Roy agreed team members could drill into the deck. As initial drilling did not permit visual access, Roy took the drill and conducted additional drilling to expand the opening. The drilling revealed white foamy substance.

Seaman Rathert, who was present at the time the pontoon was drilled, had previously noticed a caulking gun and phillips-head screwdriver in the pilot house, each of which contained fresh caulking. Rathert approached Roy and asked whether he had recently done any caulking, to which Roy responded he had only done

some caulking around windows which were leaking. Rathert then inspected the windows of the vessel and found no fresh caulking. Rathert also noted that the screwdriver he had seen earlier did not match the window screens. Continuing his sweep and in the starboard berthing area, Rathert discovered fresh caulking on a deck panel above a similarly large unaccounted-for space as had been discovered in the portside area. Rathert also observed screws partially hidden by the caulking which appeared to match the phillips-head screwdriver found earlier. Rathert inquired of Roy about the caulking in the starboard area to which Roy replied that the previous owner may have done some work there. Rathert did not communicate this information to any of his fellow officers at the time.

After a two and one-half hour search of the vessel the chief officer of the boarding team decided to terminate the boarding and return to the LEDT vessel. Before leaving the Tri-Dive, Roy was given a completed boarding report which reflected that he was in all respects in compliance with applicable United States regulations and no contraband was reported to be on board.

After returning to their vessel, members of the boarding team met with their commander to conduct a debriefing. At this time Rathert first reported to his team his finding of the caulking gun and the phillips-head screwdriver and his examination of the windows on the starboard side as well as the fresh caulking on a deck panel on the starboard side of the vessel. The team also discussed an

inconsistent statement made by Roy and his female companion. The boarding team then decided to return to the vessel and commence another boarding.

The admitted purpose by the Coast Guard officers of the second boarding, some two and one-half hours after the first boarding, was to obtain access to the compartment in the outer pontoon on the starboard side for a further space accountability and safety check. Roy was asleep at the time the officers boarded the vessel for the second time. When Roy "came up top," Officer Villafane sat down and advised him that they were going to conduct another search to obtain access to the compartment they had overlooked. Roy expressed concern over further damage to his vessel and was assured that the Coast Guard would pay for the damage. Rathert

entered the starboard pontoon, removed the wood panels from the deck, climbed into the empty compartment below, and discovered bales of marijuana in the rear of the compartment. Thereafter, Roy was given his Miranda warnings and arrested.

The basis for the Defendant's Motion to Suppress is that the Coast Guard did not have probable cause or reasonable suspicion to conduct a second search on the Tri-Dive. In response, the Government urges three positions: (1) the Defendant Roy did not have standing to object to the search of the Tri-Dive; (2) the second search of the vessel was proper pursuant to 14 U.S.C. section 89(a) or under the reasonable suspicion standard; and (3) Roy consented to the second search.

I. THE STANDING QUESTION

The United States asserts that the Defendant has demonstrated no standing to contest the search under United States v. Sarda-Villa, 760 F.2d 1232 (11th Cir. 1985),[1] as a concealed compartment was involved in which Roy had no expectation of privacy.

It was not disputed that the Defendant was the owner of the vessel, was operating the vessel at the time of the boarding, that the vessel was a forty-six foot, three hull craft and that there was only one other occupant of the vessel. The vessel was on the high seas and appeared to be solely a pleasure vessel. There was no dispute that Roy, as owner and possessor of the vessel, had an "unrestricted right of occupancy or custody

and control ... as distinguished from occasional presence." United States v. Bachner, 706 F.2d 1121 (11th Cir. 1983). The mere fact that a sealed compartment was involved did not preclude Roy, as an owner, from objecting to a search of the vessel due to his undisputed, unrestricted right of occupancy, custody, control and ownership of the vessel. United States v. Massell, 823 F.2d 1503 (11th Cir. 1987).

II. THE FIRST BOARDING

The Coast Guard has authority to stop, seize and board a vessel on the high seas so long as the vessel is "subject to the jurisdiction, or the operation of any law of the United States." 14 U.S.C. section 89(a)(1982).[2] This statute has repeatedly been held constitutional and gives the Coast Guard plenary power to stop and board any American flag vessel

anywhere on the high seas despite the absence of any suspicion of criminal activity. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). It is not disputed by either the United States or Roy that the Coast Guard officers were authorized to conduct a safety and document inspection of the vessel Tri-Dive. Therefore, the LEDT team's initial boarding to verify the Tri-Dive's compliance with safety and document regulations was proper.

III. THE SECOND BOARDING

Having concluded that the first boarding and search of the vessel was appropriate as a safety and document inspection pursuant to 14 U.S.C. section 89(a), the issue then arises whether the second search was proper or otherwise meets the reasonableness requirements of the Fourth

Amendment. United States v. Massell, 823 F.2d 1503 (11th Cir. 1987).

Roy argues that the Coast Guard extended the search beyond Fourth Amendment reasonableness standards when they returned to the Tri-Dive some two and one-half hours after signing off on a completed document and safety inspection. "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate government interest." Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979).

While the statute states that the Coast Guard may "at any time go on board" of a United States vessel, this language is modified by the remaining provisions of the statute which compels immediate action

when it "appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed." Thereafter "such person shall be arrested or if escaping to shore shall be immediately pursued and arrested ..."

The purpose of the inspection statute providing for a document and safety inspection was concluded after the first search. Thereafter, in order for the second search to be reasonable, in accord with the Fourth Amendment, the officers needed at least a reasonable suspicion[3] that Roy was engaged in some type of unlawful activity to stop, board and search the vessel a second time. See United States v. Williams, 617 F.2d 1063 (1980).

The second boarding and search in this case is analogous to the extended border search cases which hold that a

subsequent search may take place only upon a reasonable suspicion of criminal activity. See Blair v. United States, 665 F.2d 500 (4th Cir. 1981) (a Coast Guard stop of vessel on high seas is equivalent to border stop). See, e.g., United States v. Whiting, 781 F.2d 692 (9th Cir. 1986); United States v. Alfonso, 759 F.2d 728 (9th Cir. 1985). Reasonable suspicion is required, in these cases, because "actual entry has been effected and [intrudes] more on an individual's normal expectation of privacy." Alfonso, 759 F.2d at 734.

In the extended border search cases, customs officers are not required to conduct the full extent of their authorized search at one time, provided certain additional factors are present. For example, constant surveillance of a vessel after an initial border search and thereafter a

second search of the vessel has been held proper. United States v. Alfonso, 759 F.2d 728. Vessels have been initially searched pursuant to Coast Guard statutory authority and, while still in custody, taken to shore an removed from the water for further examination. United States v. Massell, 823 F.2d 1503 (11th Cir. 1987). Continued customs and inspection searches have also been upheld after reasonable search has revealed suspicious circumstances which gave rise to the need for further verification and required Coast Guard officers to return to their duty station for further instruction. United States v. Postal, 589 F.2d 862 (5th Cir. 1979); see United States v. Corral-Villavicencio, 753 F.2d 785 (9th Cir. 1985) (subsequent events raised level of suspicion such that the second stop held valid).

These factors, however, are not present in the case before this Court. The only factors upon which the Coast Guard relied as a basis for the second search was a re-evaluation or reconsideration of evidence known to them at the time of the first search. Therefore, the only justification for the second search was gleaned from evidence known to them at the time of the first search. There were no new factors brought to the Coast Guard's attention after departing and signing off the Tri-Dive, such as listing of the vessel, tossing of bales or other objects from the vessel, erratic movements of the vessel, change in course, or any other circumstances which could have created a reasonable suspicion of criminal activity to support another search of the Tri-Dive.

Further, there was no evidence that the Tri-Dive had been under surveillance since the first departure by the Coast Guard team. Cf. United States v. Alfonso, 759 F.2d 728 (9th Cir. 1985). Under these circumstances the Court finds no reasonable suspicion to provide a constitutional justification for the second boarding and the seizure of the Tri-Dive. See United States v. Postal, 589 F.2d 862, 890 (5th Cir. 1979).

Absent the authority for an extended or continued safety search or any reasonable suspicion that a criminal activity was being conducted, the second boarding was merely a general exploratory search performed with the hope of discovering evidence of a crime. Such general searches are prohibited under the U.S. Constitution. United States v. Lefkowitz, 285

U.S. 452, 465, 52 S.Ct. 420, 423, 76 L.Ed. 877 (1932) (condemning exploratory and general searches).

Upon this record and in consideration of the balancing factors, the Court concludes the second search exceeded Fourth Amendment reasonableness requirements. The officers had conducted their safety and document search without interruption. Cf. United States v. Postal, 589 F.2d 862. They were not prevented from continuing their initial search due to any occurrence such as bad weather, nor was their attention distracted by any other event. There was not even any indication that the officers intended to return after conferring with their officers shoreside or other superiors before continuing their safety and document search.

Additionally, there was no evidence that the officers were precluded from conducting a more thorough search of the vessel or that they were diverted or manipulated away from conducting a thorough search by Roy. The officers had voluntarily completed and terminated their first boarding with a report of "negative violations."

IV. CONSENT TO SEARCH

The Government has the burden of proving that consent by a defendant is freely and voluntarily given and is not mere acquiescence to a claim of apparent or lawful authority. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); United States v. Massell, 823 F.2d 1503 (11th Cir. 1987). Consent is not lightly inferred. United States v. Patacchia, 602 F.2d 218 (9th

Cir. 1979). When determining whether there was a voluntary consent to a search, the court must examine the totality of the circumstances. United States v. Massell, 823 F.2d 1503 (11th Cir. 1987). In this case the Coast Guard officers reboarded Ray's vessel while he was asleep and announced that they were going to conduct another boarding to gain access to the compartment that had not been investigated previously. The Court concludes, considering the circumstances as a whole, that Roy did not freely and voluntarily consent to a second search but merely acquiesced to the Coast Guard decision to board the vessel under the apparent authority of a document and safety search.

Although one of the officers testified that Roy consented and did not resist the second search, this was merely a con-

clusory statement and cannot be the basis for finding a free and voluntary consent absent other facts. See Bumper, 391 U.S. at 548-50, 88 S.Ct. at 1791; United States v. Baggatts, 646 F.Supp. 589 (D.D.C. 1986). In contrast to this testimony, the officers' written reports recorded immediately after the boarding reflect that the "boarding officer informed the master of the intentions to gain complete access to the compartment and the master had no objection"; it was "decided to do a second boarding on the Tri-Dive to gain access to the compartments and the captain was advised that we needed to gain access to the compartments in the outer pontoons."[4]

It is apparent in this case that Roy merely acquiesced to the apparent authority of the officers. The only words of assent occur after the officers were on

board and after he was told that they were going to conduct another boarding and needed to access the compartment. Such acquiescence does not constitute a consent. Bumper, 391 U.S. 543, 88 S.Ct. 1788.

V. CONCLUSION

The Court recognizes that in balancing the rights of an individual and the responsibility of law enforcement officers, a less restrictive standard is mandated to govern searches on the high seas as opposed to searches on land because of the difference between nautical vessels, which are transitory, and buildings or structures, which are permanent. See United States v. Williams, 617 F.2d at 1084.

The Court also recognizes the difficulties of apprehending persons engaged in smuggling in international waters and

the almost unlimited methods of deception involving concealed compartments. However, upon balance, the Court concludes that upon this record there was a Fourth Amendment infirmity in the second boarding and subsequent seizure of contraband as neither event was based on statutory authority, reasonable suspicion, or consent of the master and owner. Accordingly, Roy's Motion to suppress evidence discovered as a consequence of the unconstitutional search of the vessel Tri-Dive on the high seas is GRANTED.

Endnotes

1. Sarda-Villa is distinguishable in two respects. First, the defendant seeking to exclude evidence merely asserted an interest in the vessel. Sarda-Villa, 760 F.2d

1236. Secondly, the privacy interest alleged -- a financial interest in the contraband -- is not an interest that society is prepared to recognize. Id.

2. The statute reads as follows:

> Sec. 89. Law enforcement
>
> (a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropri-

> shore, or other lawful and appropriate action shall be taken....

3. Whether reasonable suspicion exists in a particular case depends on the totality of the circumstances. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). A hunch or generalized suspicion of criminal activity, however, is insufficient. See Id.

4. In contrast to the first boarding, Roy neither offered nor gave any assistance or cooperation in accessing the compartment during the second boarding.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-5230

UNITED STATES of America,

Plaintiff-Appellant,

v.

ROBERT WILLIAM ROY

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion April 10, 1989, 11 Cir., 198__, ___F.2d___).

(May 16, 1989)

Before KRAVITCH and HATCHETT, Circuit Judges, and MARKEY*, Chief Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are Denied.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT

_____

JOSEPH W. HATCHET
UNITED STATES CIRCUIT JUDGE

* Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2010

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT WILLIAM ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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In the Supreme Court of the United States

OCTOBER TERM, 1988

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ROBERT WILLIAM ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence that the Coast Guard seized from a vessel on the high seas.

1. On August 26, 1987, petitioner was indicted by a federal grand jury in the Southern District of Florida. He was charged with conspiracy to possess with intent to distribute at least 100 kilograms of marijuana while on board a United States vessel, in violation of 46 U.S.C. App. 1903(j) (Supp. V 1987), and possession with intent to distribute at least 100 kilograms of marijuana while on board a United States vessel, in violation of 46 U.S.C. App. 1903(a) (Supp. V 1987).

The charges against petitioner arose from events that occurred on August 14, 1987. On that day, the Coast Guard stopped and boarded a vessel on the high seas that was owned by petitioner. The marijuana that is the subject

of the indictment was seized following a second boarding of the vessel. The second boarding occurred two and one-half hours after the first boarding, when Coast Guard officers realized they had overlooked a compartment on the vessel during the inspection that was conducted at the time of the first boarding.

Petitioner filed a motion to suppress the evidence seized during the second boarding. He contended that the Coast Guard lacked probable cause to conduct a second search of a vessel on the high seas. The district court granted the motion to suppress. Pet. App. 36-60. The court concluded that although the first boarding and search of the vessel by the Coast Guard was proper as a safety and document inspection under the authority of 14 U.S.C. 89(a), the second search was unlawful and violated the Fourth Amendment.

2. The court of appeals reversed. Pet. App. 1-35. The court ruled that the district court was not clearly erroneous in finding that the Coast Guard's document and safety inspection under 14 U.S.C. 89(a) was completed during the first boarding. The court held, however, that the Coast Guard had probable cause to conduct the second search, and that the search therefore did not violate the Fourth Amendment.

3. Petitioner contends (Pet. 21-31) that the Coast Guard did not have probable cause to conduct the search. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his current contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current contention, together with any other

claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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* Because this case is in an interlocutory posture, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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